

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROL A. DOWELL)	
Claimant)	
)	
VS.)	
)	
COPP TRANSPORTATION)	
Respondent)	Docket No. 1,004,562
)	
AND)	
)	
INSURANCE COMPANY OF THE WEST)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of a March 9, 2004, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller which granted claimant's request for payment of certain outstanding medical bills.

ISSUES

Respondent contends this claim is not compensable because claimant's injury was contributed to by the claimant's alleged drug use.¹ This is the second time this issue has been before the Appeals Board (Board). In a prior Order dated March 17, 2003, the ALJ determined the results of a drug screen test were not admissible because respondent had not established there was probable cause to believe the claimant used, had possession of, or was impaired by drugs or alcohol while working. The ALJ awarded claimant temporary total disability compensation and medical treatment to be paid by the respondent. The respondent requested review and argued the ALJ erred in determining the claimant's drug screen test results were inadmissible pursuant to K.S.A. 44-

¹ K.S.A. 44-501(d)(2).

501(d)(2)(A). Respondent argued that the urinalysis test was taken because it was required by federal regulation and that requirement established probable cause. Claimant argued that neither the employer nor the trooper who investigated the accident had any suspicion claimant had used, possessed or was impaired by drugs or alcohol on the accident date. Consequently, the respondent's failure to establish probable cause required a finding that the drug screen test results were not admissible.

The Board held that the issues on that appeal, whether the results from the drug screen test are admissible, and if so, did drug use contribute to claimant's injury, were not appealable from a preliminary hearing Order. The Board dismissed the appeal for lack of jurisdiction. Respondent now seeks to have the Board revisit that jurisdictional finding and to reach the merits of respondent's defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In its prior Order the Board said:

It is undisputed that claimant suffered injuries in the course of her employment as a truck driver for the respondent. On May 3, 2002, claimant was passing a cattle truck when a vehicle in front of the cattle truck made a left turn in front of claimant. Claimant's truck hit the car and then ended up on its side in the ditch. Claimant received a traffic citation for passing in a no passing zone.

A urine sample was taken from claimant in the emergency room at the Central Kansas Medical Center in Great Bend, Kansas. Larry Davis, respondent's director of safety, noted that the urinalysis was conducted because it was required by federal regulation. He further noted:

Q. [Mr. Brumley] When you issued the test, you didn't - - when you requested the test, you didn't request the test thinking that there was drug use involved?

A. [Mr. Davis] No. We requested the test simply to make sure we were in compliance with the federal regulation. [FN 1]

Michael L. Hulse, a Kansas Highway Patrol Trooper, investigated the accident. He testified:

Q. [Mr. Brumley] So any concerns related to any probable cause as to being under the influence of a drug or alcohol, that wasn't why the test was issued?

A. [Mr. Hulse] No, sir. I had no probable cause to have a drug screen urinalysis - - breath, alcohol, there was nothing in the vehicle. I did not find any paraphernalia in my inventory search, and all probable cause was because she was driving a commercial motor vehicle and was injured. [FN 2]

The ALJ concluded the urinalysis test results were not admissible because there was no probable cause to believe the claimant used or had possession of or was impaired at the time of the accident.

The Workers Compensation Act severely restricts the admission of drug screen test results. The Act provides that six factors must be proven before drug test results can be admitted into evidence. [FN 3]

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography, gas chromatography - mass spectroscopy or other comparable reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

The Workers Compensation Act does not define probable cause. But the Board has determined the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker. [FN 4]

Before the Board can consider the question regarding the admissibility of evidence, it must first consider whether it has jurisdiction to review this preliminary hearing finding. The Workers Compensation Act requires a definite foundation to be laid before the results of a chemical test are admissible into evidence. [FN 5] Therefore, there exists a question of fact whether that foundation has been laid. In this case, the ALJ found the respondent had not established probable cause to believe that the claimant used, had possession of, or was impaired by the drug at the time of the work-related accident. Accordingly, the ALJ denied respondent's request for admission of the test results into the evidentiary record.

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in K.S.A. 44-534a or the Administrative Law Judge must have exceeded his

jurisdiction as required by K.S.A. 44-551. The jurisdictional issues listed in K.S.A. 534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply.

Because the issue now before the Board is not one listed in the preliminary hearing statute, the question becomes whether the ALJ exceeded her jurisdiction.

As with other evidentiary questions at preliminary hearing, the Judge is charged with the responsibility of determining whether the evidence proffered has sufficient reliability, relevance and foundation to be considered, knowing that the hearing is summary in nature. The Board finds the Administrative Law Judge has the authority at a preliminary hearing to determine whether the respondent has met all the foundation requirements for a chemical test to be admitted into evidence.

The Board finds the ALJ did not act arbitrarily or capriciously in her exclusion of the proffered documents and, therefore, neither abused her discretion nor acted outside the scope of her jurisdiction. Therefore, the Board concludes it does not have jurisdiction to review the ALJ's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a drug screen test result.

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.²

Respondent now cites the Board's decision in *Parker*³ as authority for its position that the Board has taken inconsistent positions on the question of its jurisdiction to review an ALJ's preliminary evidentiary ruling.

Even more interesting is the question of your jurisdiction. I attach a previous decision in this same case (you concluded that you did not have jurisdiction). I also enclose a decision rendered in Docket No, 1011700, which assumes that you do have jurisdiction to determine whether the defenses established under K.S.A. 44-534a(2) apply. I do note that the decision going my way is the more recent one. It would seem that deciding whether or not you have jurisdiction of appeals over the

² *Dowell v. Copp Transportation*, No. 1,004,562, 2003 WL 21087613 (Kan. WCAB April 29, 2003).

³ *Parker v. International House of Pancakes*, No. 1,011,700, 2003 WL 22704192 (Kan. WCAB Oct. 31, 2003).

applicability of K.S.A. 44-534a(2) is a significant issue which deserves to be addressed at oral argument.⁴

Respondent's reliance on *Parker* is misplaced. The issue in *Parker* was whether or not claimant was impaired by drugs or alcohol and, if so, whether that impairment contributed to claimant's injury. But in *Parker*, there was no drug or alcohol test. Accordingly, there was no issue concerning the admissibility of the results from such a test. The case at hand concerns an evidentiary ruling made by an ALJ at a preliminary hearing. It is an interlocutory ruling that the ALJ has the authority to make during trial. She did not exceed her jurisdiction in making that ruling. It is not a final order. It is not an issue the Board has the jurisdiction to address on an appeal from a preliminary hearing order. Because respondent's appeal does not raise an issue that the Board has the jurisdiction to decide, this appeal must be dismissed.

WHEREFORE, the appeal from the Order of Administrative Law Judge Pamela J. Fuller dated March 9, 2004 is hereby dismissed.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Richard L. Friedman, Attorney for Respondent and Ins. Co. of the West
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ Letter from Richard L. Friedman to Workers Compensation Board of Appeals (filed April 6, 2004).